IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 183

EUGENE E. MAYNARD,

Petitioner,

vs.

DURHAM AND SOUTHERN RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Supreme Court of North Carolina (R. 51-58) is reported in 251 N.C. 783 and 112 S.E. 2d 249.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on 29 January, 1960 (R. 59). The petition for a writ of certiorari was filed on 27 April, 1960 and was granted on 27 June, 1960 (R. 60). The jurisdiction of this Court is invoked under Title 28, United States Code, §1257.

Questions Presented

1. Does the right to trial by jury guaranteed by the Federal Employers' Liability Act extend to a disputed release to the same extent that it does to an issue of negligence?

2. In a State Court action, under the Federal Employers' Liability Act, was a judgment as of involuntary nonsuit proper when the plaintiff produced evidence at the trial admittedly sufficient for the jury on the question as to the defendant's negligence, and evidence that:

(a) he was paid no consideration for a release relied upon by the defendant railroad and

(b) the release was procured by fraudulent concealment by agents of the defendant railroad of the real intent and purport of the instrument and by acts and omissions which, under the circumstances, were designed to mislead and did mislead the plaintiff into believing that he was signing for his pay check?

Statute Involved

The statutory provision involved is Federal Employers' Liability Act, 45 U.S.C.A., §51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the

death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149 §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

Statement

The petitioner was injured on August 22, 1955 while assisting in the loading of a motorized track car into the rear of one of the defendant's trucks in Dunn, N.C. (R. 16). The case was tried in the Wake County Superior Court, Raleigh, N.C. at the Second April Regular Civil Term, 1959, before Williams, J. At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was denied. The defendant introduced its evidence which included what was purported to be a release signed by the plaintiff and renewed its motion. The

motion was allowed (R. 15). The plaintiff appealed to the Supreme Court of North Carolina, which affirmed the decision of the Wake County Superior Court by an opinion printed in the Transcript of Record (R. 51), reported in 251 N.C. 783 and 112 S.E. 2d 249. Justice Parker dissented.

The defendant conceded in open Court in the North Carolina Supreme Court "that probably the evidence offered by the plaintiff in the trial below was sufficient to take the case to the jury had the plaintiff not signed the release set out herein, which the defendant pleaded in bar of his right to recover" (R. 54-55). Following his injury, the plaintiff was off the job for several days as a result of his injuries, including a stay of six or seven days at Duke Hospital (R. 19). The plaintiff returned to work prior to the 17th day of September, 1955, and was working for the defendant on September 15, 1955.

On Saturday, September 17, 1955, the plaintiff went to the office of the defendant's General Manager to get his paycheck (R. 20-21). At the time he went to the General Manager's office, the defendant owed him $144.60 for labor (R. 20-21). When the plaintiff entered the General Manager's office, he asked for his paycheck (R. 21). The General Manager pushed a paper lying on his desk toward the plaintiff, and keeping the paper partially covered with his hand, told the plaintiff to sign it (R. 21). The plaintiff had been required to sign for every paycheck he had ever received from the defendant (R. 21), and, believing that it was a receipt for wages, he signed the document later identified as the defendant's Exhibit No. 2 (R. 21, 46) and received $144.60, the exact amount due him at the time for labor, from the defendant (R. 21).

The plaintiff did not read the paper he signed in the office of the defendant's General Manager (R. 21, 26, 27).

The paper was not explained to him (R. 21, 27). He was not told that he was signing a release (R. 26). He was not given a chance to read the paper (R. 27). The defendant's General Manager kept the paper partially covered with his hand (R. 21, 26, 27). The plaintiff, who was misled into thinking that he was signing for his paycheck (R. 21), signed the paper believing it was a receipt for wages (R. 27). He would not have signed the paper had he known it was a release (R. 31). The money paid to the plaintiff by the defendant as consideration for the so-called release was money actually due the plaintiff for labor performed (R. 21). The plaintiff was never paid anything for the injuries he received on the occasion in question (R. 21, 31). On the morning the release was signed the plaintiff had been taking medicine prescribed by his doctor for pain (R. 21) and was not rational (R. 27).

After September 17, 1955, the plaintiff worked for the defendant until May 16, 1956, at which time he was forced to stop due to his physical condition (R. 27). The plaintiff did not work again for the defendant (R. 29), and was discharged by the defendant in December, 1956 (R. 29). The plaintiff went to several doctors between May 1956 and December 1956 (R. 27) and had several conferences with the defendant's representatives in September and October, 1956, during which the defendant's representatives attempted to get the plaintiff to return to work (R. 28, 29). During one of these conferences on October 12, 1956, he was told by the defendant's representatives that he could not return to work unless he would sign a full release (R. 28, 31). This was never done (R. 21, 22).

Summary of Argument

The plaintiff attacked the validity of the so-called release on two grounds: First, that the release was unsupported by any consideration and therefore void and, second that its execution was procured by fraud, misrepresentation and undue influence on the part of defendant's agents.

1. With respect to the question of consideration, the plaintiff produced evidence at the trial that the defendant was indebted to him in the sum of $144.60 for wages when the so-called release was executed and that he thought he was signing the payroll records. On this point, the Supreme Court of North Carolina relied on the reasoning in the decisions of two intermediate State Courts—in the cases of *Williams* v. *East St. Louis Junction Railroad Co.*, 349 Ill. App. 296, 110 N.E. 2d 700 (1953) and *Kavadas* v. *St. Louis Southwestern Railroad Co.* (Mo. App.), 263 S.W. 2d 736 (1954), both of which are factually distinguishable and both of which involved primarily the question of inadequacy of consideration, not total failure of consideration. The Supreme Court of North Carolina apparently overlooked, among others, several federal cases, including *Burns* v. *Northern Pacific Railroad Co.*, 8th Cir., 134 F. 2d 766, and *Hogue* v. *National Automobile Parts Association*, 87 F. Supp. 816, which hold that a release is not supported by a sufficient consideration unless something of value is received to which the creditor had no previous right.

2. The second basis upon which the plaintiff attacked the validity of the release was that its execution was procured by fraud, misrepresentation, and undue influence. The Supreme Court of North Carolina dismissed this contention of the plaintiff referring only to the intermediate state court decisions of *Williams* v. *East St. Louis Junc-*

tion Railroad Co. and *Kavadas* v. *St. Louis Southwestern Railroad Co., supra* and apparently overlooking the overwhelming weight of federal authority to the contrary. The North Carolina Supreme Court simply noted that the plaintiff "does not show any fraud or duress on the part of the defendant or its agents but, on the contrary, his own testimony negatives his allegations in that respect."

The plaintiff's evidence on this feature of the case was abundantly sufficient to support a jury finding that the plaintiff was deliberately misled by the acts and omissions of defendant's agent into believing that what he was signing was a receipt for his pay check.

The vast Federal authority holds that, under the circumstances revealed by the record in this case, the issue of fraud in the procurement of the release should have been submitted to the jury. *Dice* v. *Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359, 96 L. Ed. 398; *Purvis* v. *Pa. R.R. Co.*, 3rd Cir., 198 F. 2d 631, certiorari denied 344 U.S. 898, 97 L. Ed. 694; *Graham* v. *Atchison, T. and S.F. Ry. Co.*, 9th Cir., 176 F. 2d 819; *Ricketts* v. *Pa. R.R. Co.*, 2d Cir., 153 F. 2d 757; *Irish* v. *Central Vermont Ry., Inc.*, 2d Cir., 164 F. 2d 837; *Camerlin* v. *N.Y. Central R. Co.*, 1st Cir., 199 F. 2d 698; *Scarborough* v. *A.C.L. R.R. Co.*, 4th Cir., 202 F. 2d 84; *Brown* v. *Pa. R.R. Co.*, 2d Cir., 158 F. 2d 795; *Gifford* v. *Wichita Falls and S. Ry. Co.*, 5th Cir., 211 F. 2d 494; *Marshall* v. *N.Y. Cent. R.R. Co.*, 7th Cir., 218 F. 2d 900.

POINT ONE

Federal, Not State, Law Prevails.

As in the case of other matters arising under the Federal Employers' Liability Act, the validity of releases under that Act raises a Federal question to be determined by Federal rather than State law.

Dice v. *Akron, Canton and Youngstown Railroad Company*, 342 U.S. 359, 96 L. Ed. 398; *South Buffalo Railway Company* v. *Ahern*, 344 U.S. 367, 97 L. Ed. 395; *Garrett* v. *Moore-McCormack Company, Inc.*, 317 U.S. 239, 87 L. Ed. 239. As was stated by the Court of Appeals for the Ninth Circuit in *Graham* v. *Atchison, T. and S.F. Ry. Co.*, 9th Cir., 176 F. 2d 819 at 824:

> "In applying this principle, Courts have held, in very recent years, that the validity of a release entered into by an Employee entitled to the benefits of the Federal Employers' Liability Act, is . . . governed by Federal Law."

POINT TWO

Defendant Concedes Evidence Sufficient to Take the Case to Jury Had Plaintiff Not Signed the So-Called Release.

In open Court in the North Carolina Supreme Court the "defendant concedes that probably the evidence offered by the plaintiff in the trial below was sufficient to take the case to the jury had the plaintiff not signed the release set out herein, which the defendant pleaded in bar of his right to recover" (R. 54, 55). The plaintiff clearly produced evidence showing that the injuries of which he complains resulted "in whole or in part" from the negligence of the defendant. 45 U.S.C.A., Sec. 51; *Ellis* v. *Union Pac. R. Co.*,

329 U.S. 649, 91 L. Ed. 572; *Wilkerson* v. *McCarthy*, 336 U.S. 53, 93 L. Ed. 497; *Stone* v. *N.Y., Chicago & St. L. R. Co.*, 334 U.S. 407, 97 L. Ed. 441.

The Supreme Court of the United States in *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500, 1 L. Ed. 21, 493, at page 500, noted that "The Statute (45 U.S.C.A., Sec. 51) expressly imposes liability upon the employer to pay damages for injury or death due in whole or in part to its negligence . . . The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

POINT THREE

Only Preponderance or Greater Weight of Evidence Is Required to Set Aside Release.

In the trial in the Superior Court and in the North Carolina Supreme Court the respondent contended that the release under consideration could not be set aside except by evidence which was clear, strong and convincing (R. 55).

In this contention, the respondent has little, if any, support.

In the case of *Purvis* v. *Penn. R.R. Co.*, 3rd Cir., 198 F. 2d 631, certiorari denied 344 U.S. 898, 97 L. Ed. 694, the court noted that prior to the case of *Dice* v. *Akron, C. and Y. R. Co.*, 342 U.S. 359, 96 L. Ed. 398, "It had been assumed that the Federal Rule was that the evidence had

to be clear, unequivocal and convincing." After referring repeatedly to the *Dice* case, however, the Court of Appeals for the Third Circuit concluded that in actions under the F.E.L.A. involving the validity of a release alleged to have been procured by fraud, "Proof of fraud need be only by a preponderance of relevant evidence."

The North Carolina Supreme Court declared in the principle case below that North Carolina recognizes the rule to be the same:

> In this jurisdiction, if the action is to set aside an instrument allegedly procured by fraud or undue influence, the burden of proof to establish such allegation is by the preponderance or greater weight of the evidence. On the other hand, if the action is to reform an instrument, the evidence must be clear, strong, cogent, and convincing. *Walters* v. *Bridgers,* 251 N.C. 289, 111 S.E. 2d 176; *Henley* v. *Holt,* 221 N.C. 274, 20 S.E. 2d 62; *Ricks* v. *Brooks,* 179 N.C. 204, 102 S.E. 207; *Bolich* v. *Insurance Co.,* 206 N.C. 144, 173 S.E. 320.

POINT FOUR

So-Called Release Unsupported by Any Consideration and Therefore Void.

The decision of the Supreme Court of North Carolina in the instant case is directly in conflict with the relevant decisions of the Federal Courts and with the standard imposed by the Federal law governing the construction, operation, and effect of releases despite the conceded fact that the liability of the defendant Railroad in this case must be determined in accordance with decisions of the Federal Courts interpreting and construing the Federal Employers' Liability Act and cases arising thereunder.

In the trial below, the plaintiff attacked the validity of the so-called release on two grounds: First, that the release was unsupported by any consideration and therefore void and, second that its execution was procured by fraud, misrepresentation, and undue influence on the part of the defendant's agents.

With respect to the question of consideration, the plaintiff produced evidence at the trial that the defendant was indebted to him in the sum of $144.60 for wages when the so-called release was executed; that he thought he was signing the payroll records. On this point, the Supreme Court of North Carolina relied on the reasoning in the decisions of two intermediate State courts—in the cases of *Williams* v. *East St. Louis Junction Railroad Co.*, 349 Ill. App. 296, 110 N.E. 2d 700 (1953) and *Kavadas* v. *St. Louis Southwestern Railroad Co.* (Mo. App.), 263 S.W. 2d 736 (1954), both of which are factually distinguishable and both of which involved primarily the question of inadequacy of consideration, not total failure of consideration.

There would seem to be no question but that a release, like any other contract, must be supported by consideration. 76 C.J.S., RELEASE, Sec. 10, p. 633; *Barnes* v. *Ward, et al.*, 45 N.C. 93. It appears to be equally well established that the performance by the Releasee of some legal duty owing by him to the Releasor is not consideration for a release. 76 C.J.S., RELEASE, Sec. 14, page 636. As stated in 76 C.J.S., RELEASE, at page 636:

> "A release of a legal obligation for which the consideration is the performance by the releasee of some undisputed legal duty owing by him to the releasor . . . is invalid for want of consideration. As otherwise stated, the rule is that a release is not supported by a sufficient consideration unless something of value was received to which the creditor had no previous right.

> So the full performance of an admitted debt or the full performance of one obligation is not consideration for the release of a second debt or obligation, likewise, performance by one person of his legal obligation is no consideration for the release of another."

Burns v. *Northern Pacific Ry. Co.*, 8th Cir., 134 F. 2d 766, involved an action by a railroad steward against his employer for wrongful discharge. The railroad's defense was based primarily upon a release procured from the plaintiff in consideration of the sum of $225.00. The plaintiff, who attacked the validity of the release on the theory that it was unsupported by consideration, introduced evidence tending to show that at the time the release was executed, the defendant was indebted to him in the sum of $225.18 for wages and expenses. In the lower Court, a judgment was entered upon a directed verdict for the defendant. In reversing the lower Court the Circuit Court, after noting that at the time the release was procured the defendant was indebted to the plaintiff in an amount in excess of the sum paid for the release, held:

> "A release is not supported by a sufficient consideration unless something of value is received to which the creditor had no previous right." (Citing: *Tupper* v. *Massachusetts Bonding and Ins. Co.*, 156 Minn. 65, 194 N.W. 99.)

The Court in the *Burns* case also noted:

> "A person cannot create a dispute sufficient as consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion, and not compromise."

The decision in the *Burns* case was squarely followed in *Hogue* v. *National Automotive Parts Association*, 87 F.

Supp. 816. See also *Moruzzi* v. *Federal Life and Casualty Co.*, 42 N.M. 35, 75 P. 2d 320, 115 A.L.R. 407.

In the instant case, the plaintiff testified (R. 20, 21) that when he went to the office of the defendant's General Manager on the morning that the so-called release was signed the General Manager "Asked me what he could do for me and I told him I wanted my pay check, meaning that I wanted a check for what was due to me for my time with the Railroad." The plaintiff also testified (R. 21):

> "I signed the paper because every check that we ever got from the railroad we had to sign for it. I thought I had to sign it for my pay check. At that time the railroad owed me $144.60 odd cents for labor. I never received anything from the railroad as a result of the injury which I have described here today."

It is submitted that in the light of the evidence noted above there was abundant evidence to the effect that at the time the so-called release was executed the defendant was indebted to the plaintiff in an amount at least equal to, if not in excess of, the recited consideration for the release (R. 50c). Had the jury been given the opportunity, it would certainly have been justified in so finding. Had the jury so found, it appears by virtue of the authorities noted above that the release would have been void for lack of consideration. In any event, counsel for the plaintiff feel that the evidence on this point was more than sufficient to require its submission to the jury.

POINT FIVE

Execution of So-Called Release Procured by Fraud, Misrepresentation, and Undue Influence on Part of Defendant's Agents Required Submission to Jury.

The second basis upon which the plaintiff attacked the validity of the release was that its execution was procured by fraud, misrepresentation, and undue influence. The Supreme Court of North Carolina dismissed this contention of the plaintiff referring only to the intermediate state court decisions of *Williams* v. *East St. Louis Junction Railroad Co.* and *Kavadas* v. *St. Louis Southwestern Railroad Co., supra* and apparently overlooking the overwhelming weight of federal authority to the contrary. The North Carolina Supreme Court simply noted that the plaintiff "does not show any fraud or duress on the part of the defendant or its agents but, on the contrary, his own testimony negatives his allegations in that respect."

The plaintiff's evidence on this feature of the case was abundantly sufficient to support a jury finding that the plaintiff was deliberately misled by the acts and omissions of defendant's agent into believing that what he was signing was a receipt for his pay check. In this connection, it should be borne in mind that this case was withdrawn from the jury by a judgment of involuntary nonsuit and that even under the North Carolina Rules of Practice any discrepancies or contradictions in the plaintiff's testimony are, on motion to nonsuit, to be construed in the light most favorable to plaintiff. *Keaton* v. *Taxi Co.*, 241 N.C. 589, 86 S.E. 2d 93, citing other authority.

The petitioner's evidence may be summarized as follows:

On Saturday, September 17, 1955, the plaintiff went to the office of the defendant's General Manager to get his

pay check (R. 20-21). At this time, the defendant owed him $144.60 for labor (R. 20-21). The plaintiff had been taking medicine prescribed by his doctor for pain (R. 21) and was not rational (R. 26). The plaintiff took no one with him and he and the General Manager were alone in the latter's office (R. 21). The defendant's General Manager asked the plaintiff how he was getting along and the plaintiff replied that he wasn't any better, that he still hurt (R. 21). The General Manager then asked the plaintiff what he could do for him and the plaintiff replied that he wanted his pay check (R. 21). (The Court's attention in invited to the fact that the meeting in question took place on a Saturday morning, a day upon which laborers normally receive their wages.)

When the plaintiff requested his paycheck, the defendant's General Manager took a paper from his desk drawer and, keeping it partially covered with his hand, pushed it across his desk for the plaintiff and told the plaintiff to sign it (R. 21). The plaintiff had been required to sign for every pay check he had ever received from the defendant (R. 20-21) and, believing that the paper was a receipt for wages, he signed the document later identified as the defendant's Exhibit number two (R. 20-21) and received a check for $144.60, the exact amount due him by the defendant at the time for labor (R. 21).

The plaintiff, who "thought a lot" of the defendant's General Manager (R. 26), did not read the paper he signed in the office of the defendant's General Manager (R. 21, 26). The paper was not explained to him nor was it read to him (R. 21). He was not told that he was signing a release (R. 26).

He was not given a chance to read the paper (R. 26, 27). The defendant's General Manager kept the paper partially covered with his hand (R. 21, 26). The plaintiff, who was

misled into thinking he was signing for his paycheck (R. 21) signed the paper believing it was a receipt for wages (R. 26). He would not have signed the paper had he known it was a release (R. 31). The plaintiff was never paid anything for the injuries he received on the occasion in question (R. 21, 31).

An examination of the host of Federal precedents apparently overlooked by the Supreme Court of North Carolina, will thoroughly substantiate the conclusion that the issue of fraud in the procurement of the release should have been submitted to the jury.

The case of *Dice* v. *Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359, 96 L. Ed. 398, appears to be the leading authority on releases taken under the Federal Employers' Liability Act. It involved a railroad fireman who admitted signing a document, which later turned out to be a full release for injuries sustained by him in a derailment, for the sum of $924.63. The plaintiff who did not read the release, contended that it was void because he had signed it relying on the defendant's representations that it was nothing more than a receipt for back wages. The Supreme Court of Ohio reversed a lower Court Judgment for the plaintiff, primarily on the theory that the plaintiff was "guilty of supine negligence" in failing to read the release and the case came to the Supreme Court of the United States on writ of certiorari to the Supreme Court of Ohio. In reversing the Ohio Supreme Court, the Supreme Court of the United States, after noting that Federal law controlled, rather than the law of the State of Ohio, and that the Supreme Court of Ohio was in error in applying Ohio law to a release taken under the Federal Employers' Liability Act, held that the case was properly submitted to a jury and that a judgment should have been entered on the jury's verdict. In reaching this conclusion, the Supreme Court of the United States held:

"We hold that the correct Federal rule is that . . . a release of rights under the Act is void when the Employee is induced to sign it by the deliberately false and material statements of the Railroad's authorized representatives made to deceive the Employee as to the contents of the release."

The Court also noted:

"The right to trial by jury is a basic and fundamental feature of our system of Federal Jurisprudence and . . . is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."

The case of *Purvis* v. *Pennsylvania R.R. Co.*, 3rd Cir., 198 F. 2d 631, certiorari denied 344 U.S. 898, 97 L. Ed. 694, which was decided subsequent to the *Dice* case, is almost on "all-fours" with the case at hand. The plaintiff sustained certain personal injuries on October 13, 1943, while in the employ of the defendant. Twelve days later, while claiming wages due in the amount of $48.00, he signed a release of his claim for personal injuries and received a check for $45.00. He admitted his signature on the release, but stated that "It must have been covered up with paper" at the time he signed it. He also testified that he "wouldn't have signed a release at the time." He did not read the release. There was no evidence of any affirmative misrepresentation on the part of the defendant's Claim Agent.

The Court of Appeals for the Third Circuit held in the *Purvis* case:

"We agree with the District Judge that the validity of the release, under the testimony, was properly a jury question . . . Whether there was fraud in the obtainment of the release was held to be a jury question and rightly so."

It is difficult to distinguish the factual situation before the Court of Appeals for the Third Circuit in the *Purvis* case from the factual situation in the case at hand. If anything, the facts of the *Purvis* case were more favorable to the defendant than the facts in the instant case.

Counsel for the plaintiff believe that the court below committed error in that it incorrectly interpreted the applicable Federal law. It is submitted that an examination of the relevant Federal decisions will thoroughly substantiate this conclusion.

The Court of Appeals for the Ninth Circuit, for example, commenting on the question of fraud in the procurement of a release under the Federal Employers' Liability Act in *Graham* v. *Atchison, T. & S.F. Ry. Co.*, 9th Cir., 176 F. 2d 819 at 826, said:

> "The courts have frequently held in no uncertain terms that, where a release is tainted with fraud, it should not be sustained, and that the question of whether or not such taint exists is one to be submitted to and decided by the jury. In *Kansas City M.B. Ry. Co.* v. *Chiles*, 86 Miss. 361, 38 So. 498, it was said 'No release of this nature should be upheld if *any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction.* (Emphasis supplied.) And in passing on the validity of such release when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown.' This attitude accords with the views of this Court, which considers even 'An innocent misrepresentation of the facts of the releasor's injury, made by the releasee's physician,' *Great Northern R. Co.* v. *Fowler*, 9th Cir., 136 F. 118, as a ground for voiding a release induced by it."

In *Ricketts* v. *Pennsylvania Railroad Co.*, 2d Cir., 153 F. 2d 757, it appeared that the plaintiff retained an attorney merely to collect his wages and tips allegedly due by the defendant. He also had a claim against the defendant for personal injuries. He later signed a release in his attorney's office, without reading it, believing it covered only the claim for wages and tips. The release actually covered the plaintiff's claim for personal injuries. The Court held that, under the circumstances, the release was invalid and did not preclude the plaintiff from maintaining an action under the Federal Employers' Liability Act for the personal injuries in question.

Irish v. *Central Vermont Ry. Inc.*, 2d Cir., 164 F. 2d 837, involved the validity of a release signed by an injured railroad employee who testified that he had been induced to execute the release by the Railroad Claim Agent's false representation that he would attempt to get the railroad to grant the plaintiff a pension. There was no question but that the plaintiff knew exactly what he was signing when he executed the release. The lower Court, basing its decision on the law of the State of Vermont, entered judgment for the defendant on the theory that there was insufficient evidence of fraud to take that issue to the jury and, further, that the plaintiff had failed to prove that he had made a restoration or a tender of restoration, of the consideration paid for the release. The Court of Appeals for the Second Circuit reversed, holding that the lower court was in error in applying Vermont law to a case arising under the Federal Employers' Liability Act and that, under the Federal law, the evidence of fraud was sufficient for the jury. The court further held that it is not necessary for a railroad employee who is attacking a release taken under the Federal Employers' Liability Act for fraud, to show a return or tender of consideration as a prerequisite to the maintenance of the action.

Camerlin v. *N.Y. Cent. R. Co.*, 1st Cir., 199 F. 2d 698, is one of the most significant cases decided in recent years involving the validity of a release taken under the Federal Employers' Liability Act. In that case, the plaintiff, a railroad employee, executed a full release for the sum of $950.00. This sum was based upon a representation by the defendant's agent that he would be out of work for six (6) months and that he was entitled to receive $25.00 per week, the same amount paid under the New York Workmen's Compensation Law, plus his medical expenses, estimated at $350.00. The defendant's agent further represented that if the plaintiff had not recovered at the end of the six months, he would continue to receive the $25.00 per week. The plaintiff testified that he thought the document he was signing was merely a "receipt to show he (the defendant's agent) delivered the $25.00 a week for the six months, plus $350.00."

The District Court granted the defendant's motion for summary judgment. The Court of Appeals for the First Circuit reversed, holding that the evidence of fraud and misrepresentation was sufficient for the jury. The Court said:

> "We take it as an a fortiori conclusion from the majority opinion in *Dice* v. *Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359, that on a complaint in a Federal District Court under the Federal Employers' Liability Act, *if there are any genuine issues of fact relevant to the validity of purported release, such issues are to be determined by the jury, not by the trial judge.*" (Emphasis added.)

The Court of Appeals in the *Camerlin* case also had occasion to pass upon the quality of proof necessary to set aside a release for fraud under the Federal Employers'

Liability Act. After mentioning two earlier cases, the Court said:

> "But in each the Court was applying the older rule that a release cannot be avoided except upon evidence which is clear, unequivocal, and convincing. This may have been the rule at one time but, at least as applied to cases under the Federal Employers' Liability Act, we take the Federal rule now to be, as indicated in the recent case of *Purvis* v. *Pennsylvania R.R. Co.*, 3d Cir., 198 F. 2d 631, that it is enough if the Employee establishes, by a preponderance of the relevant evidence, the facts invalidating the release."

In *Scarborough* v. *A.C.L. R.R. Co.*, 4th Cir., 202 F. 2d 84, the Court of Appeals for the Fourth Circuit specifically adopted the rule already adopted by the Third and Eighth Circuits concerning the quality of proof necessary in cases of fraud arising under the Federal Employers' Liability Act. The Court said:

> "The *Dice* case also makes two other points crystal clear. One point is that, as to the avoidance of the Statute of Limitations, the Federal law governs, not the State law. The second point is that even as to fraud (and it would seem, a fortiori, as to misstatement) this need be proved by the plaintiff only by a preponderance of the evidence."

Brown v. *Pennsylvania R. Co.*, 2d Cir., 158 F. 2d 795, is another case which appears to be squarely in point, by way of factual analogy, to the facts of the case at hand. In that case, a railroad employee testified that he signed a general release of liability for injuries, without reading it in full, believing it to be a receipt for lost wages, because of representations made by the defendant's Claim Agent. The

Court held, per curiam, that the question of whether the release was procured by misrepresentation was for the jury.

The recent case of *Gifford* v. *Wichita Falls and S. Ry. Co.*, 5th Cir., 211 F. 2d 494, involved a railroad employee who had signed a full release in consideration of the sum of $6,000. He brought an action under the Federal Employers' Liability Act, contending that the release was procured by the fraud of the defendant's agent in promising him a lifetime job. The court held evidence sufficient, under the Federal law, to take the question of fraud in the procurement of the release to the jury.

Marshall v. *N.Y. Cent. R.R. Co.*, 7th Cir., 218 F. 2d 900, was an action for wrongful death brought under the Federal Employers' Liability Act. The District Court entered judgment for the defendant on the theory that a full release executed by the personal representative of the deceased employee was a bar to the maintenance of the action. The plaintiff's testimony indicated that she had signed the release on the representation that it was a receipt for expense money. The Court of Appeals reversed, and held that the issue of fraud in the procurement of the release should have been submitted to the jury. The Court, noting that appellate courts have carefully scrutinized releases taken under the Federal Employers' Liability Act, to make sure that they are "untainted by fraud or over reaching," noted:

> "In every case of which we are aware, decided in recent times and involving the question of validity of release from liability under the Federal Employers' Liability Act, a directed verdict in favor of the defendant, a summary judgment in favor of the defendant or a

judgment notwithstanding the verdict, has been reversed." (Numerous cases cited.)

See also *Texas & N.O. Ry. Co.* v. *Thompson*, Tex. Com. App. 12 S.W. 2d 963; *Texas and Pacific Ry. Co.* v. *Presley*, 137 Tex. 232, 152 S.W. 2d 1105; *Johnson* v. *Elgin J. & E. Ry. Co.*, 338 Ill. App. 316, 87 N.E. 2d 567; *Pacific Elec. Ry. Co.* v. *Dewey*, 95 Cal. App. 2d 69, 212 Pac. 2d 255.

CONCLUSION

The only authorities cited by the North Carolina Supreme Court were the decisions of two intermediate state courts, i.e., *Williams* v. *East St. Louis Junction R. Co.*, *supra* and *Kavadas* v. *St. Louis Southwestern Ry. Co.*, *supra*, both of which, it is respectfully contended, involve inadequacy, not total lack, of consideration. The applicable federal authorities require careful scrutinization of releases taken under the Federal Employers' Liability Act, to the end that it may be insured that they are not tainted with fraud, or unsupported by consideration. It is submitted that by withdrawing the instant case from the jury the Supreme Court of North Carolina failed to discharge this duty.

For the reasons stated, it is respectfully submitted that the judgment of the court should be reversed.

Respectfully submitted,

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